Supreme Court, U. S.
FILED
OCT 27 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

No. 78-335

VS.

ROBERT LAFONTAINE,

Respondent.

REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

RONALD REOSTI (P 19368)
Attorney for Respondent

REOSTI & PAPAKHIAN

658 Pallister
Detroit, Michigan 48202
(313) 875-9800

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S. E.
GRAND RAPIDS, MICHIGAN 49503 — TELEPHONE 458-5326

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Introduction

Petitioner has filed a supplemental brief in support of its petition based on *O'Neill* v. *Public Law Board No. 550*, CA No. 77-1339 (7th Cir., 1978). This Brief is respondent's reply.

ARGUMENT

In its petition for certiorari the carrier has alleged two grounds. First, it says that 29 USC 153 (First) (j) does not apply to Public Law Boards. Second, it argues that even if 29 USC 153 (First) (j) applies, that statute was complied with in the case at bar. If the *O'Neill* case, *supra*, supports petitioner at all, it is only supportive of the second argument.

The Seventh Circuit, in *O'Neill,* holds that:

> ". . . we agree with the Sixth Circuit's reasoning and conclusion that the provisions of Section 153 (First) (j) are applicable to proceedings before Public Law Boards . . . *O'Neill,* 99 LRRM 2204, 2206."

Thus it is clear that the Notice and Appearance provision applies to *LaFontaine.* The Seventh Circuit relied on *Cole* v. *Erie Lackawanna Ry.,* 541 F2d 528 (6th Cir., 1976) to support its decision, and cites the same legislative history the *Cole* Court cited. *O'Neill, supra,* makes clear that 29 USC 153 (First) (j) applies to Public Law Boards established pursuant to 29 USC 153 (Second). No grounds for certiorari are present for there is no conflict between Circuits, or between this Court and any Circuit. Petitioner's first ground for certiorari is even less convincing after *O'Neill.*

Petitioner cites *O'Neill* only as support for its second ground for certiorari. Petitioner argues, in its supplemental brief, that after *O'Neill* it is clear that the Sixth and Seventh Circuits are in conflict. Petitioner writes:

> As to *Cole,* the Seventh Circuit had this to say:
>
> "We hold in contrast to the Sixth Circuit that where an individual employee authorizes his Union to represent him before such boards and to receive any notices on his behalf, Section 153 (First) (j) does not require actual notice be given to the individual employee." Petitioner's Supplemental Brief at p. 3 citing *O'Neill, supra.*

The *Cole* Court had held that:

> ". . . in situations where employee-grievants have authorized their Union to handle their grievances NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings. [cites omitted]"

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with Union officials and relay such information as he possesses which might allow the Union to more effectively present his claim." *Cole, supra* at 534.

The conflict is apparent. *Cole* says that even if the Union is authorized, notice must be sent to grievant. *O'Neill* disagrees. *Cole* relied on Seventh Circuit opinions to reach its decision. The Seventh Circuit now says, in *O'Neill,* that the cases cited by *Cole* do not support the conclusion reached by *Cole.*

Although the clash between *O'Neill* and *Cole* is clear, that conflict does not affect *LaFontaine.* Petitioner does not analyze the effect of this conflict on the case at bar in its supplemental brief.

In both *O'Neill* and *Cole* the Courts held the employee had authorized the Union to represent him before the Board. In *LaFontaine,* that authorization is, in fact, one of the issues. Under *Cole* even if LaFontaine authorized the Union to represent him, he still had a right to notice. However, unlike *O'Neill* or *Cole,* LaFontaine had not authorized his union to do any more than convene a Public Law Board. He specifically told the union he would represent himself, and the union agreed to this procedure.

In fact, the Sixth Circuit frames the issue in *LaFontaine* differently than either *Cole* or *O'Neill.* The Court writes:

> "The sole issue in this case is whether an employee *on whose behalf a union had submitted a claim of wrongful discharge* to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of hearing . . ."

The Court recognized the authorization issue for it does not state the union was authorized, to represent respond-

ent before the Board, only that the union submitted a claim on respondent's behalf; i.e., had convened a Public Law Board. Under the *Burley* cases such mere submission does not equal authorization. *Elgin J & E Ry.* v. *Burley,* 325 US 711 at 746, 16 LRRM at 763 (1945-Burley (I)). The *LaFontaine* Court then goes on to cite *Cole's* language defining actual notice, and requiring it even when the Union is so authorized. It is obvious that if notice is required when the union is authorized, it is more needed when the union is not authorized.

This factual difference delineates *LaFontaine* from *Cole.* It also shows that the conflict is between *Cole* and *O'Neill,* not *LaFontaine* and *O'Neill.* Although petitioner believes O'Neill argued that he revoked the union's authorization, respondent finds no evidence of such an argument in the *O'Neill* decision. On the other hand, it is undisputed that LaFontaine not only asked to represent himself, but that the union agreed he should do so. The Sixth Circuit recognized the authorization problem in the instant case. If the Seventh Circuit held the Union was not authorized, as was the case in *LaFontaine,* it too would have held that LaFontaine deserved notice, and would remand the claim to the Public Law Board. There is no conflict between *LaFontaine* and *O'Neill.* The result in *LaFontaine* would be the same in both circuits.

Elgin J & E Ry. v. *Burley,* 327 US 661 (1946 — Burley (II)) Court frames the issue of authorization as follows:

> ". . . what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claim or to represent him exclusively before the Adjustment Board." *Supra* at .....

The Court refrains from answering this question. The Court writes that an award is presumed valid because:

> "There can be no presumption that the union submitting the dispute would undertake to usurp the aggrieved employee's right to participate in the proceedings by other representation of his own choice . . ."

Yet that is exactly what petitioner urges. *Burley (II)* attempted to preserve various rights, such as conferring with the carrier prior to settlement, rejecting a settlement, and having his or her own representative before the Board. Those rights were denied herein. The Sixth Circuit has determined that the best way to preserve them is to require actual notice to the employee so that he or she may participate. That is clearly a reasonable and easily complied with requirement.

The *O'Neill* Court would also, presumably, require actual notice in cases where the union was not authorized to represent grievant. That rule is harder to administer for it requires a finding by each Public Law Board that authorization exists.

The question of authorization was dealt with in respondent's brief. (pp. 13-18) *Burley (II)* suggests that a union is presumed to be authorized to represent a grievant before the Boards. Various factors support that presumption, all of which may be rebutted. In the case at bar petitioner relies on these factors. First, it says respondent stood by without acting while the union pressed his claim. The facts belie this notion; for respondent told his union he wanted to represent himself and the union agreed. Second, petitioner says that since respondent's union submitted his claim the presumption arises. There is no such legal rule. In fact, *Burley (I), supra* at 746, contains language which clearly negates this factor. That Court wrote:

> "Nor can we say as a matter of law that the mere making of a complaint through local Brotherhood officials amounted to final authorization to the union to

settle the claims or represent the employees before the Board."

This statement is more compelling in the context of a Public Law Board where the employee-grievant has no right to appeal to that Board on his own.

The final factor relied on by petitioner is Article 44 of the UTU Constitution which purports to authorize the Union to represent all members in minor disputes. The *Cole* Court held that, "any existing doubt must be resolved in favor of authorization in light of Article 44." *Supra* at 534. This factor, however, in *LaFontaine* was rebutted by undisputed evidence that the union agreed to allow respondent to appear on his own behalf, and agreed to notify him of the hearing. In essence, the union waived its authorization.

Further, the constitution does not have conclusive weight as to the issue of authorization. *Burley (II), supra.* In fact, the *Burley (II)* Court's suggestion that the union constitution may provide authorization is less valid today than it was when *Burley (II), supra* at Fn. 2, and *Burley (I),* at Fn. 38, were decided. As *Burley* (*I*) notes: ". . . the Act [RLA] does not contemplate the existence of closed shops . . ." *supra* at Fn. 31. The UTU and petitioner today operate a union shop. The *Burley* decisions suggested that rules governing Constitutional provisions of voluntary, unincorporated associations might be used to establish authorization. This union is no longer a wholly voluntary group. By joining it, respondent does not necessarily freely accept its rules. Failure to join, results in a loss of employment. This added factor makes the *Burley* footnotes of questionable vitality, today.

Furthermore, *Burley (I)* specifically prohibits the union and carrier from establishing a collective agreement that would abrogate individual rights under section (j). To-

day, that is exactly what has happened. The UTU and company negotiated a union shop agreement, requiring all employees to accept Article 44, or lose their jobs. Article 44 cannot, under *Burley (I)* be given conclusive weight. As a presumption, it stands rebutted herein.

Besides, this conflict between circuits is not of such moment that action by this Court is needed. Not many cases can exist with the factual basis of the instant case. The requirement of actual notice to the employee is easily met. Each Public Law Board must simply send a letter to each grievant. This is not a big job since each Public Law Board has only about thirty claims, requiring thirty letters. In a very real sense, this petition presents much ado about nothing. However, to respondent that notice was crucial. It meant the difference between a fair hearing, since he could not rely on his union, and a hearing that ignored key parts of his claim. The end result is the difference between employment, and unemployment.

In conclusion, respondent believes certiorari should be denied. First of all, *O'Neill* clearly applies §(j) to Public Law Boards. Second, even if there is a conflict between *Cole* and *O'Neill,* regarding the method of satisfying §(j), that conflict does not apply herein. *LaFontaine* is distinguishable from both. Third, even if the conflicts exist, the Sixth Circuit's result was correct because the union was not authorized to represent respondent. Fourth, the *Cole* case is correct in requiring notice under *Burley (II),* as a simple way of satisfying the statutory rights. This rule is easily complied with, so that this petition presents no issue of such importance that this Court should grant certiorari.

CONCLUSION

Respondent prays that this Court deny certiorari.

Respectfully submitted,

REOSTI & PAPAKHIAN

RONALD REOSTI (P 19368)
Attorney for Respondent
658 Pallister
Detroit, Michigan 48202
875-9800

DATED: October 16, 1978